

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

John DOE # 1, et al.,

Plaintiffs,

v.

SAM REED, in his official capacity as  
Secretary of State of Washington, et al.,

Defendants.

CASE NO. C09-5456BHS

ORDER DENYING PLAINTIFFS'  
MOTION FOR INJUNCTION  
PENDING APPEAL

This matter comes before the Court on Plaintiffs' motion for injunction pending appeal. Dkt. 320. The Court has considered the pleadings filed in support of and in opposition to the motion and the remainder of the file and hereby denies Plaintiffs' motion for injunction pending appeal for the reasons stated herein.

**I. PROCEDURAL & FACTUAL BACKGROUND**

On July 28, 2009, Plaintiffs (collectively "Doe") filed this action to object to and enjoin the disclosure of Referendum 71 ("R-71") petitions on two constitutional bases: Count I, that disclosure of any referendum or initiative petitions is unconstitutional as a

1 general matter; and Count II, that disclosure of R-71 petitions would be unconstitutional  
2 as applied to Doe (i.e., R-71 initiative signers). *See* Dkt. 2 (Complaint). On September  
3 10, 2009, the Court granted preliminary injunctive relief on Count I but declined to rule  
4 on Count II. Dkt. 62.

5 Defendants appealed the Court's ruling and the Ninth Circuit reversed. *Doe v.*  
6 *Reed*, 586 F.3d 671 (2009). The Supreme Court accepted review and affirmed the Ninth  
7 Circuit decision. *Doe v. Reed*, 130 S. Ct. 2811 (2010). The Supreme Court left open the  
8 possibility of relief under Count II (Doe's as-applied challenge to disclosure).

9 On June 29, 2011, the parties each filed motions for summary judgment regarding  
10 Doe's as-applied challenge. Dkts. 196, 204, 208, and 209. The parties fully briefed these  
11 matters. Additionally, the Secretary of State of Washington moved to strike certain  
12 evidence relied upon by Doe. Dkt. 231 (motion to strike and reply to Doe's response in  
13 opposition to summary judgment). On October 17, 2011, the Court granted summary  
14 judgment in favor of Defendants and denied Doe's motion for summary judgment, lifted  
15 the injunction that prevented the disclosure of the R-71 petitions, and closed the case.  
16 Dkt. 319.

17 On October 17, 2011, Doe filed the instant motion for injunction pending appeal  
18 and noted the motion for November 7, 2011. Dkt. 320. Also on October 17, 2011, Doe  
19 filed their notice of appeal. Dkt. 321. On October 20, 2011, Doe filed an emergency  
20 motion at the Ninth Circuit Court of Appeals requesting that the Ninth Circuit: (1) enjoin  
21 Defendants from releasing the R-71 petitions pending this Court's ruling on the motion  
22 for injunction pending appeal; and (2) enjoin this Court from disclosing the identities of

1 the plaintiffs and their witnesses. *See* Dkt. 324. The Ninth Circuit denied Doe’s motion  
2 for failure to comply with Rule 8(a) of the Federal Rules of Appellate Procedure as they  
3 did not seek expedited consideration of the motion in this Court, nor did they await this  
4 Court’s ruling on the motion. *Id.* However, the Ninth Circuit issued a temporary  
5 injunction enjoining Defendants from further releasing any R-71 petitions and ordered  
6 that the injunction remain in effect for five days following this Court’s ruling on the  
7 motion. *Id.*

8 For a more complete procedural and factual background in this matter, see the  
9 Court’s order on the parties’ motions for summary judgment (Dkt. 319).

## 10 II. DISCUSSION

### 11 A. Mootness

12 “Mootness is a threshold jurisdiction issue.” *S. Pac. Transp. Co. v. Pub. Util.*  
13 *Comm’n of Oregon*, 9 F.3d 807, 810 (9th Cir. 1993). “Simply stated, a case is moot  
14 when the issues presented are no longer ‘live’ or the parties lack a legally cognizable  
15 interest in the outcome.” *Powell v. McCormack*, 395 U.S. 486, 496 (1969).

16 Defendants argue that the controversy brought in Plaintiffs’ motion for injunction  
17 pending appeal was rendered moot “by the disclosure of the Court order and R-71  
18 petitions, and the extensive broadcasting of these documents on the internet.” Dkt. 327 at  
19 8-10. Defendants maintain that the Court cannot grant Doe effective relief, and therefore,  
20 a live controversy no longer exists. *Id.* at 9-10.

21 The Court agrees with Defendants that the effectiveness of any relief now given  
22 would be less than that available had the injunction been sought prior to the disclosure of

1 the Court's order releasing the names of Plaintiffs and their witnesses and Defendants'  
2 dissemination of some R-71 petitions. However, to the extent that some relief could be  
3 given by enjoining Defendants from disseminating any further R-71 petitions, the Court  
4 concludes that there remains a live controversy and Doe's motion is not entirely moot.  
5 Accordingly, the Court will consider Doe's motion on its merits.

6 **B. Injunction Pending Appeal**

7 The standard for issuing an injunction pending an appeal is the same as that used  
8 for issuing a preliminary injunction. *See Humane Soc. of U.S. v. Gutierrez*, 558 F.3d 896  
9 (9<sup>th</sup> Cir. 2009) (citing *Winter v. Natural Resources Defense Council*, 555 U.S. 7, 20  
10 (2008)). The court may issue a preliminary injunction where a party establishes (1) a  
11 likelihood of success on the merits, that (2) it is likely to suffer irreparable harm in the  
12 absence of preliminary relief, that (3) the balance of hardships tips in its favor, and (4)  
13 that the public interest favors an injunction. *Winter*, 555 U.S. at 20.

14 For the reasons stated in the Court's order granting Defendants' motion for  
15 summary judgment (Dkt. 319), the Court concludes that Doe has failed to show a  
16 likelihood of success on the merits. In addition, even if Doe could show such likelihood,  
17 they have failed to establish that irreparable harm would occur in the absence of an  
18 injunction. Defendants have already released several copies of the R-71 petitions (*see*  
19 Dkt. 327 at 6-7) and such petitions are now available on the internet. Doe has failed to  
20 show how they would be irreparably harmed by Defendants releasing further R-71  
21 petitions when copies of such petitions have already been posted on the internet and  
22 given to individuals and organizations whose activity cannot be reached by the injunction

1 sought. In addition, Doe has failed to show how redacting the names of Plaintiffs and  
2 their witnesses would provide relief when the order revealing such information has been  
3 available for several weeks. In addition, the Court concludes that the balance of equities  
4 tips in favor of denying the injunction where the Court has decided the merits of the case  
5 in favor of disclosure and the names and petitions have already been disclosed. Finally,  
6 the Court concludes that it is in the public interest for the names and petitions to be  
7 released as the Court has found that the public is entitled to disclosure. Accordingly,  
8 Doe's motion for injunction pending appeal must be denied.

### 9 **III. ORDER**

10 Therefore, it is hereby **ORDERED** that Doe's motion for injunction pending  
11 appeal (Dkt. 320) is **DENIED**.

12 Dated this 8<sup>th</sup> day of November, 2011.

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15 BENJAMIN H. SETTLE

16 United States District Judge  
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